NO. 87-1317

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

GUSTE, ATTORNEY GENERAL OF LA, ET AL.

Petitioners,

V.

THE UNITED STATES OF AMERICA; ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Date: April 26, 1988

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LIST OF PARTIES

The following additional petitioners are not listed in the caption: Cashco Oil Company, Seneca Resources Corporation and Pelto Oil Company. These parties were intervenors in the case below and joined the Petition for Certiorari before this Court and also join this Reply Brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Cases

Legislative History Sources

INTRODUCTORY COMMENT

Respondents, Samedan Oil Corporation ("Samedan") and the United States of America, the Department of the Interior, and the Minerals Management Service (the "federal respondents"), have submitted Briefs in Opposition to the Petition for Writ of Certiorari. This reply brief is submitted to address issues raised in the Respondents' Briefs.

ARGUMENT

The Brief in Opposition filed on behalf of Samedan raises in the first instance before this court the regulations of the Secretary of the Interior regarding offshore operations on federal lands.[1] Notably absent from this recitation are the Secretary's regulations for

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[1] See pages 11-13 of Samedan's Brief In Opposition.

unitization of state/federal lands. Such regulations are nonexistent.

The OCSLA states in pertinent part as follows:

> The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provision herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter . . . . The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

* * *

(4) For unitization, pooling, and drilling agreements[2]

The Secretary is obligated, by §8(g)(3), to undertake a diligent good faith effort to effectuate an agreement with a state where drainage is occurring across a state/federal boundary and is obligated, by §1334(a), to establish regulations to that end. As regards the West Delta properties, the Secretary has failed to enter such good faith negotiations and, as part of his synergistic program for avoidance of his statutory obligation, he has also failed to promulgate any regulations regarding the procedures, protocol, criteria or standards to be utilized when a common potentially hydrocarbon-bearing area is

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[2] 43 USC 1334(a).

determined by the governor of a coastal state to exist.

The Secretary's obligation for the promulgation of regulations as set forth in 43 USC §1334(a) indicates first that the Secretary shall provide regulations with regard to unitization and second that the Secretary is to prescribe, when it is "necessary and proper," regulations providing for the conservation of OCS natural resources, prevention of waste and protection of correlative rights. Even absent this conflict, the Secretary cannot contend that the issuance of regulation for these situations is not "necessary and proper". The establishment of such regulations would clearly be in the best federal interests for the conservation of OCS natural resources, protection of correlative rights and prevention of

waste. Still no regulations have even been proposed.

The Respondents argue that Louisiana has not provided a definitive explanation of how the mechanics of the Secretary's obligations under §8(g)(3) would be performed. They further raise the specter that adoption of the Petitioners' position would result in the federal judiciary assuming a type of technical adminstrative status in unitization cases. These arguments are mere subterfuge and misdirection of the judiciary's attention from the fact that it is not incumbent upon the Petitioners or the courts to formulate such procedures. Rather, it is incumbent upon the Secretary to prescribe those procedures in a regulatory program as called for by Section 8(g)(3) and Section 1334(a).

The Secretary utterly disregarded Section 8(g)(3) prior to commencement of this litigation. The Secretary has occasionally confected, solely for the purposes of his arguments herein, self-serving correspondence to assert his recognition of the existence of the statutory provision. Some of these documents are now being cited by Respondents as probative evidence of the Secretary's consideration of the critical issues.[3] Despite lip-service to the statute, the Secretary's functioning administrative policy is unchanged from that he has espoused from the commencement

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[3] The correspondence referenced in footnote number 4 on page 7 of the Federal respondents' Brief in Opposition reflects that the Secretary has summarily rejected unitization for coastal waters at the Louisiana/federal border. Petitioners assert that were it not for the present action, the Secretary would never have acted in any fashion (even in his present erroneous manner) to address any rights across state/federal borders.

of this litigation, to wit: Section 8(g)(3) may be ignored.

The brief of the federal respondents contains yet another shift of statutory interpretation by the Secretary. When he testified on the proposed bill before the Senate Energy Committee, he described Section 8(g)(3) as a mandatory provision.[4] After the passage of the bill, the Secretary ignored Section 8(g)(3) in his dealings with the Petitioners prior to commencement of this litigation. Then, he said that Section 8(g)(3) is absolutely discretionary and that he did not want to confect an agreement. Now, he says that he does not want to do an agreement on a "piecemeal tract-by-tract basis" but is interested in an agreement affecting "substantial portions"

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[4] See Pet. App. pages 25-26 for the complete text of Secretary Hodel's comment.

of state-federal leases.[5] One is puzzled by whether the Secretary's latest shift is influenced more by recognition of statutory duty or by a belated recognition that refusal to unitize is a two-way street, perhaps brought sharply to his attention by recently discovered common reservoirs in which Louisiana is draining the United States. Regardless of the motivation, the Secretary's conduct highlights the folly of his legal position that 8(g)(3) will be used when it is beneficial to the United States but will not be utilized if the

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[5] See pages 6-7 of the brief of the Federal respondents and the accompanying footnote number 4.

situation benefits Louisiana.[6] Such a high-handed and inequitable operating policy would remove any motivation Louisiana might have to use the unitization process. Thus, the arbitrary refusal of the Secretary to act pursuant to Section 8(g)(3) has brought to an end an era of state-federal cooperation in OCS development. Even prior to the passage of the 1978 version of Section 8(g), both sovereigns entered voluntary agreements

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[6] In footnote number 4 on page 7 of their brief, the Federal respondents claim that Louisiana has avoided stating that the obligations of Section 8(g)(3) are imposed upon the coastal states as well as the Federal government. This statement is totally incorrect. On page 16 of the Reply Brief filed by Petitioners in the Fifth Circuit Court of Appeals proceeding, the Petitioners stated: "The appellants [Petitioners] have long recognized and stated that Section 8(g)(3) has bilateral effects and protects both sovereigns from the inequitable effects of drainage." In truth, it is the Federal respondents who have claimed that the provision is one-sided.

motivated by good faith and mutual respect. The Secretary's refusal to honor Section 8(g)(3) removes even the pre-1978 unitization incentives and introduces a new era of confrontation, rather then cooperation.

The Respondents further assert that the Secretary is vested with "absolute discretion," unreviewable by the judiciary. This position is untenable, particularly in light of the failure of the Secretary to establish any procedures, protocol, criteria or standards to address the state/federal unitization issue.[7] The

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[7] In Mendoza v. Secretary of Health and Human Services, 655 F.2d 10, 13 (1st Cir. 1981), the court refuted this administrative approach.

> The [statutory] phrase [at issue] . . . could conceivably mean that the Secretary has unbridled discretion . . . . But discretion does not usually include the right to act arbitrarily or without

(continued)

Secretary thus urges an unconscionable result wholly abrogating the correlative rights of coastal states and affected parties in certain instances and those of the United States in others.[8]

On page two of their brief, the federal respondents state that the Governor of Louisiana rejected an "offer" to unitize the subject property pursuant to the 1978 version of Section 8(g). A reference to the Governor's decision,

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criteria. Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 507 (4th Cir. 1973).

[8] As of this filing, drainage is occurring off of Louisiana's coast across state/federal borders at various locations. In this instance, drainage favors the federal government and its lessees. However, there are other reservoirs common to Louisiana and federal leases in which the drainage favors the state. Absent unitization of those common reservoirs, the United States will not be protected from drainage, thus depriving it of substantial revenues it would have otherwise earned for the production of its natural resources.

without an explanation of the historical and legal context, is extremely misleading. At the time the "offer" was made, the coastal states and the federal government were litigating the issue of whether the 1978 Section 8(g) provided compensation for "drainage only", as claimed by the federal government, or whether it included compensation to coastal states for economic and environmental effects of OCS operations, as claimed by the coastal states. The "offer" was rejected because it was a ploy to force the state into accepting the "drainage only" theory. The federal respondents' suggestion of a different motive for the Governor's rationale in rejecting the "offer" ignores the true reason for his declining it.

The federal respondents' claim that the 1986 version of 8(g) was designed to

"settle the entire Section 8(g) issue" and therefore preclude this litigation[9] conveniently ignores an explanation of just what was the "entire Section 8(g) issue". The lengthy and expensive litigation over the 1978 version of 8(g) was to determine whether the states were entitled to compensation for the economic and environmental effects of OCS operations. The federal government contended that Section 8(g) was designed only to compensate the coastal states for drainage of their natural resources.[10] Therefore, the issue that Congress intended to resolve with the 1986 legislation was the affirmation that the coastal states would receive benefits for

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9 Page 5 of Federal respondents' Brief.

10 State of Texas v. Secretary of the Interior, 580 F.Supp. 1197 (E.D. Tex. 1984).

the economic and environmental damages caused by OCS operations. The legislative tool for this resolution is Section 8(g)(2) which expressly states that the payments thereunder are for such purposes. Section 8(g)(3), therefore, exists to protect the sovereigns from drainage. In the tremendous volume of pleadings filed in this case, the respondents have never refuted the clear, unequivocal words of Senator Bentsen when he said of the 1986 legislation:

> "[B]oth the State and Federal oil and gas will be protected from drainage by unitization or other royalty sharing agreement".[11]

Respondents assert the Fifth Circuit undertook detailed analysis of the legislative history to reach their statutory interpretation. This is

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[11] 131 Cong. Rec. S15429 (daily ed. November 14, 1985) (statement of Sen. Bentsen).

false. The opinion of the Fifth Circuit reflects cursory review of the statute on a facial reading only without consideration of pertinent Congressional statements.[12] Such cursory review is unconsistent with proper judicial procedure as stated in Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 104 S.Ct. 439, 444-5 (1983) in which this court held:

> . . . while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, NLRB v. Iron Workers, supra, 434 U.S., at 350, 98 S.Ct., at 660, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory

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[12] See e.g., the statement of Senator Bentsen quoted above, and those of Secretary Hodel and the House Merchant Marine & Fisheries Committee recited at pages 25-26, Pet. App. These statements have gone unaddressed and unrefuted by the Fifth Circuit and by the Respondents. The reliance on the statement by Senator Johnston is unwarranted since his comment was taken out of context.

> mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291-292, 85 S.Ct. 980, 988-989, 13 L.Ed.2d 839 (1965). See Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166, 92 S.Ct. 383, 390, 30 L.Ed.2d 341 (1971).

The Brief in Opposition filed by Samedan continually addresses legislative history and judicial pronoucements on the 1978 version of Section 8(b). All such references are wholly irrelevant to 1986 Section 8(g) issues. Further, the Respondents and the Fifth Circuit meticulously avoid reference to any 1986 Section 8(g) legislative history other than a bill drafted by the Alaskan delegation which, in fact, was never introduced and was not, as Respondents claim, rejected by Congress. Respondents' strategy of avoiding substantive discussion of the 1986 legislative history is

sound. The relevant legislative history is damning to their arguments.[13]

Both the brief of Samedan and that of the federal respondents raise the issue that this is a suit over "revenues." It is not; it is a suit to achieve unitization by enforcement of Section 8(g)(3). The ultimate outcome of a unitization order is a delineation of the pro rata distribution of production attributable to owners of interests within the unitized area. While this litigation may effect a mandate for commencement of unitization proceedings, the distribution of revenues is not at issue here. The interpretation of statutory obligations is the issue.

CONCLUSION

Section 8(g)(3) provides specific directives to the Secretary of the

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[13]See Pet. App. at pages 24-27.

Interior for the resolution of drainage conflicts brought about by the discovery of common reservoirs of oil and gas spanning state/federal borders in coastal waters.

In this matter the Secretary of the Interior has made no diligent good faith effort to comply with the Congressional purposes embodied in Section 8 (g)(3). To the contrary, the Secretary has approached his duties under Section 8(g)(3) as "absolutely discretionary," thus effectively excising Section 8(g)(3) from the legislation. In his evisceration of that section from the OCSLA, the Secretary has further assured his unwillingness to comply with Congressional policy, notwithstanding possible rulings and pronouncements of the judiciary, by failing to provide any regulatory mechanism for effectuation of a uniti-

zation agreement even if he should decide to exercise his "absolute discretion" and seek a unitization solution.

Based on the foregoing and the previously submitted petition, the Petitioners urge this Court to issue a Writ of Certiorari to the Fifth Circuit Court of Appeal for review of this matter.

Respectfully submitted,

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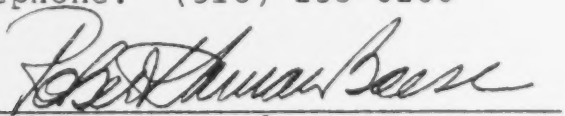
By: 
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CERTIFICATE OF SERVICE

I, ROBERT L. BOESE, Counsel of Record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Reply Brief of Petitioners have been served on this 26th day of April, 1988, on each of the following, in each case by deposit of the copies to be served in a United States post office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

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It is hereby certified that all parties required to be served with the foregoing Reply Brief of Petitioners have been listed and served as of this 26th day of April, 1988, in the manner described hereinabove.

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